United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-1550

To be argued by
ROBERT L. ELLIS

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1550

UNITED STATES OF AMERICA

Appellee,

—against—

CARMINE TRAMUNTI, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANT-APPELLANT ANGELO MAMONE

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REPLY BRIEF OF DEFENDANT-
APPELLANT ANGELO MAMONE

In our main brief we argue that the proof was insufficient to connect Mamone to a conspiracy; that, at best, the jury could find that Mamone engaged in constitutionally protected associations at locations where he was constitutionally entitled to attend. Stated otherwise, the episodes in which Mamone's name appears; viz., the money counting incident, the Forbrick and Burke incidents are within the ambit of First Amendment protected associations and speech because each episode was too trivial and too remote to affect the success or failure of the venture or to constitute the kind of concrete, practical impetus, the kind of material and substantial participation in the enterprise necessary to establish criminality.

The government has deftly sidestepped the issues raised by Mamone's appeal. To buttress a feeble case they endeavor to create a picture of the case against Mamone completely at variance with the record. Accordingly, in this reply brief we will first attempt to pinpoint some of the more flagrant misstatements of the facts.

We further contend in our main brief, in the alternative, that the proof against Mamone was so marginal that the impact of various trial errors; viz., the improper use of hearsay, the total inadequacy of the pretrial disclosure, the denial of a severance, the inflammatory summations and the imbalanced summary of the evidence in the Court's charge, combined to deprive him of a fair trial. We briefly discuss the government's reply to each of our "trial error" contentions.

THE GOVERNMENT'S STATEMENT OF FACTS

In our main brief (pp. 56-8) we took exception to what we considered to be misstatements of fact relating to Mamone in the government's arguments to the jury. We will enumerate several of the more flagrant "factual" assertions in the government's brief, which it is submitted exceeds anything argued below, and with respect to each demonstrate its impropriety.

A. "The participation of...Mamone in large narcotics transactions in the course of the conspiracy was established by ample direct proof." (Government's brief, p. 49.)

There is not a scintilla of evidence in the record, direct or otherwise, that Mamone participated in any narcotics transaction or that he was even present when a narcotics transaction was arranged, consummated or discussed. The government's assertion that "direct evidence" shows that he participated in large transactions is necessarily unsupported by reference to the record because nowhere in the record is there an iota of evidence that Mamone participated in a narcotics transaction of any kind.

If by "direct evidence of participation in large narcotics transactions" the government refers to the money counting incident, the Forbrick incident or the Burke incident, the only episodes the record suggests involve Mamone, the government takes unwarranted semantic license for each of these episodes occurred independent of and long after any narcotics transaction had been completed without, as the record shows, the slightest involvement or knowledge on the part of Mamone.

B. "DiNapoli had frequent contacts with... Mamone at his Bronxdale Avenue home." (Government's brief, pp. 49, 51.)

Here, too, the government fails to find a record citation to support its statement. The only evidence that DiNapoli and Mamone were even together is a photograph taken outside of the Beach Rose Social Club (Government exhibit 56). There is not a word in the record that Mamone ever met with DiNapoli at the Bronxdale Avenue address let alone that they "frequently" met there.

The government also misstates the testimony of Genevieve Patalano who described herself as DiNapoli's common law wife. They claim "she testified that she had seen both Angelo Mamone and Vincent Papa visit DiNapoli at 1908 Bronxdale Avenue" (Footnote, p. 29).

Miss Patalano actually testified:

"Q. Did you see him [Mamone] from time to time at 1908 Bronxdale Avenue?
A. I know Butch Mamone a long time. I know Butch Mamone before I knew Joseph DiNapoli.
Q. Did you ever see him at 1908 Bronxdale Avenue?
A. Yes I did." (Emphasis added.) (3268)

Miss Patalano further testified that she met Mamone through a seafood restaurant owned by Mamone's wife and mother-in-law and that she met him before she met DiNapoli (3273-5). There is nothing in her testimony or elsewhere in the record to suggest the frequency of Mamone's visits to 1908 Bronxdale Avenue, that he ever went there to see DiNapoli rather than Miss Patalano, who Mamone had known since 1968, or that he was ever at that address when DiNapoli was present. Indeed, other than the aforesaid photograph, there is no non-hearsay evidence that DiNapoli and Mamone even knew each other.

C. Mamone "participated in Inglese's narcotics operation by...settling disputes...and screening customers."

The government's brief is replete with more subtle distortions of the evidence against Mamone. For example, in describing the role of the various defendants it is asserted (br. p. 7) that Mamone "screened customers". Presumably, the government refers to the off-hand comment by Mamone, uttered when he chanced to hear a conversation between Barnaba and Inglese concerning Forbrick's desire to see Inglese to obtain the return of his money, that Forbrick was "okay", that his wife and Forbrick's wife were good friends (1368-9).

The government does not explain how it ascribes to Mamone the magisterial function of "screening customers" from this single, obviously unpremeditated and chance occurrence.

Moreover, it grossly overstates the matter for the government to contend that in this concededly chance, offhand comment, Mamone "persuaded" Inglese to speak directly to Forbrick (government brief, p. 51).

The government's proclivity for escalating the singular into the plural is evident when they describe Mamone's participation in the conspiracy to include "settling disputes" (br. p. 7). The record shows that once and only once Mamone acted to save Barnaba from violence at the hands of Burke months after the completion of the underlying transaction - a transaction in which Mamone played no part and with respect to which there is no suggestion that he had prior knowledge. Mamone was never even remotely involved in settling any other "dispute". The Burke incident, of which Mamone became aware by pure chance after Barnaba had been complaining to Inglese for a month or two, is described in detail at pp. 16-17 of our main brief. There is nothing in that incident or anywhere in the record to justify the claim that Mamone "settled disputes".

D. Mamone as DiNapoli's Partner

The government repeatedly contends that Mamone and DiNapoli were partners. We submit that the evidence of such partnership is grossly insufficient. As noted, the only evidence that Mamone and DiNapoli were ever in each other's presence is a single photograph taken outside the Beach Rose Social Club (government's exhibit 56). The only suggestion of a DiNapoli-Mamone partnership is the testimony of John Barnaba reporting a hearsay statement of Pat DiLacio which, if anything, is an ambiguous chain of garbled pronouns (1461-1462):

> "Yes. I [Barnaba] had gone there to see if -- I was out, I had no more goods -- to see if he got anything, and he says no, he didn't.
> Q. Will you take your hand down so I can hear you a little better?
> A. He said, no, he didn't; he [DiLacio] had seen Joe DiNapoli and he told him no, no way, and that he was trying to see his partner, Butchie.
> I said, 'Butchie', I says, 'Butchie is away.'
> He said, 'No, not that Butchie, Butchie Mamone.'
> I said, 'That's his partner.'
> He said, 'Yes.'
> I said, 'How many partners does he have?'
> Q. How many partners does who have? Who were you referring to?
> A. To Joe DiNapoli
> Q. What did Patty say, if anything?
> A. Patty didn't say anything."

Whether it was DiNapoli or DiLacio who was trying to see "Butchie" according to Barnaba's version of DiLacio's story is impossible to determine from the record. Equally impossible to determine is the basis for DiLacio's belief that DiNapoli and Mamone were partners since there is no evidence that DiLacio or anyone else ever actually approached Mamone for narcotics. Certainly, John Barnaba who supposedly had been told by DiLacio of the DiNapoli-Mamone partnership never approached Mamone, not even when he was cooperating with the authorities by attempting to set up persons he believed to be involved in narcotics (1639-40). Moreover, as shown in our main brief (pp. 40-3) DiLacio's hearsay statement was improperly admitted lacking, as it did, the foundation of legal evidence.

E. Angelo Mamone...was "intimately involved in Inglese's operation". (Government brief, p. 39.)

In our main brief we pointed out that there was no evidence that Mamone was present at a narcotics transaction, that he discussed narcotics or that he ever stored, cut or possessed narcotics. No witness claimed that he initiated, arranged, planned, financed, directed, managed or supervised any activity connected with narcotics.

The absence of such evidence negates the contention that Mamone was "intimately" involved in Inglese's narcotics operation.

Concededly, the jury could find that Mamone was frequently present at the Beach Rose Social Club. However, the record is clear that the Beach Rose Social Club was a neighborhood gambling and social club frequented by many neighborhood people other than those involved in this case (Tr. 719). As Frank Stasi pointed out, Mamone was a gambler and he went to the Beach Rose Social Club three or four times a week to play cards, just as he went other places to gamble (Tr. 381, 719-20). Moreover, attendance at the Club cannot establish knowledge of or participation in a conspiracy because the arrangements for narcotics transactions made there were surreptitiously entered into so that card players and outsiders would not learn of the illicit activities (Tr. 285, 287, 721-22).

As we pointed out in our main brief and the government does not dispute, Mamone was legally entitled to attend the Beach Rose Social Club and associate with whomever he found there. It is respectfully submitted

that incidental to such protected associations is the right to engage in the kind of casual speech and activity as involved in the money counting and Forbrick incidents. Certainly the right to associate is not limited to standing mute and completely inactive. Without evidence of criminal intent, of an agreement to join the venture and make it one's own, of evidence of substantial participation in the venture, the money counting and Forbrick incidents cannot support the inference that Mamone was a member of a narcotics conspiracy.

Similarly, the alleged remark that Burke was Mamone's customer is insufficient to place Mamone in the conspiracy in the absence of evidence that Mamone and Burke actually dealt in narcotics within the term of this conspiracy as alleged in the indictment or within the period of limitations. (See our main brief, pp. 27-29.)

Mamone's alleged intercession to save Barnaba from violence at the hands of Burke months after a narcotics transaction was completed may have warranted conviction of Mamone as an accessory after the fact under 18 U.S.C. 3 had such a charge been included in the indictment:

> "But the mere fact that a person 'receives, relieves, comforts or assists' one who has been a member of an aborted or completed conspiracy does not make him a participant in the controversy...". United States v. Freeman, 498 F. 2d 569, 575 (2nd Cir. 1974).

It is respectfully submitted that Freeman's acts to rescue co-conspirators from arrest* are legally indistinguishable from Mamone's acts to rescue Barnaba from violence. If the evidence was insufficient to support the finding that Freeman was a member of the conspiracy, it is equally insufficient to support the finding that Mamone is a member of the conspiracy involved here.

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*The opinion indicates that Freeman, with knowledge that co-defendants were sought by the authorities for narcotics violations, attempted to obtain the personal effects of one Rudner from her hotel room; that Freeman was aware of the method in which the cocaine smuggling operation was conducted; that Freeman paid money and offered cocaine to a third person to obtain the said personal effects; and that Freeman and the third person arranged a cover story to conceal Freeman's participation.

AS TO THE ADEQUACY OF
THE PRE-TRIAL DISCLOSURE

The government's response to our contention that Mamone was prevented from investigating the charge against him by the paucity of pre-trial disclosure completely misses the point.

The issue is not the adequacy of the indictment but whether Mamone could prepare his defense in light of the conceded facts that before trial, disclosure of his alleged involvement was limited to the money counting incident, an incident which the government conceded was insufficient to place Mamone in the conspiracy, and that Mamone was to learn of every material element of the case against him "as the proof unfolded". (See our main brief, pp. 44-50.)

The fact that the indictment may have specified seventeen overt acts against others and that we spent a week listening to debriefing tapes which did not even contain a bare mention of Mamone, is immaterial since Mamone, presumed innocent, was entitled to reasonable disclosure of the specific charge linking him to the conspiracy to enable him to prepare his defense.

The cases cited in our main brief demonstrate that the general rule that the prosecution need not disclose its evidence must yield when, as here, a defendant genuinely lacks knowledge and requires disclosure to prepare his defense.

United States v. Salazar, 485 F. 2d 1272 (2nd Cir. 1973), the authority principally relied upon by the government (br. p. 74), is not to the contrary. Unlike Mamone who received no particulars of his specific involvement, the defendant in Salazar was granted detailed particulars four days before trial. The issue there was timeliness rather than adequacy of the particulars. The government cites no case where a defendant was forced to wait until trial to learn of each and every material allegation concerning the nature of his involvement in an alleged conspiracy.

Moreover, the government's attempts to minimize the prejudice to Mamone must fail. They suggest that "it would have been remarkable" if Burke, Forbrick or DiLacio had testified since each was a defendant or potential defendant. The point is not whether they would have

testified for Mamone, but whether Mamone was denied an opportunity to determine by his own investigation whether those persons engaged in the transactions at the times and places attributed to them by government witnesses. Because Mamone was denied adequate pre-trial disclosure, the testimony of government witnesses concerning his alleged involvement necessarily stood uncontradicted.

Similarly, the suggestion that Mamone should have moved to depose severed defendant Forbrick before trial is unavailing since Mamone had no reason to believe that the case against Forbrick related in any way to the case against him or that Forbrick had material evidence concerning Mamone. In the absence of pre-trial disclosure of at least enough of the case against him sufficient to place him in the conspiracy, there was no more reason for Mamone to have deposed Forbrick than Estelle or Basil Hansen, Mary Jane Salviani or any of the numerous other severed defendants.

AS TO MAMONE'S STANDING
TO CHALLENGE THE SEIZURE
AND INTRODUCTION OF THE
MILLION DOLLARS
(Government's brief, p. 71.)

Mamone adopts the arguments of defendant DiNapoli and others regarding the legality of the seizure and introduction of the million dollars. It is respectfully submitted that he has standing to do so (i) because of the enormous prejudicial effect so spectacular an item of evidence had upon the jury; and (ii) because the case against Mamone was tainted by the million dollars in that the government argued that Mamone was DiNapoli's partner and, thus, implicitly, that he had a proprietary interest in the money.*

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*Mamone's request to participate in DiNapoli's motion to suppress was denied by the trial Judge.

AS TO THE GOVERNMENT'S SUMMATION

The United States Attorney attempts to justify his inflammatory summation as fair response to the arguments of defense counsel.

Be that as it may, improprieties in the government's summation substantially prejudiced Mamone who, it is submitted, said nothing upon trial to invite this kind of response. Moreover, it is disingenuous for the United States Attorney to dismiss his comments about Vincent DiNapoli as "merely ask[ing] the jury to use its common sense" about DiNapoli's failure to testify (br. p. 103) in light of Mr. Curran's emphasis, (Tr. 5094):

> "...DiNapoli was sitting as a spectator in the second row right here staring at Stasi while Stasi testified. What does your common sense tell you about that?"

Such comments could only be understood by the jury as a contention by the United States Attorney that DiNapoli was somehow trying to intimidate Stasi.

Finally, the government does not attempt to dispute or to justify its material misstatements of fact contained in the summation relating to the Burke incident or to the alleged corroboration of the case against Mamone. As pointed out in our main brief (pp. 56-7), such misrepresentations of the testimony cause "inevitable prejudice" to defendants and require a new trial here. United States v. Drummond, 481 F. 2d 62, 64 (2nd Cir. 1973).

AS TO THE COURT'S MARSHALLING OF THE EVIDENCE

Contrary to the claim advanced in the government's brief (pp. 104, et seq.) Mamone does not contend that the trial Judge, in marshalling the evidence, should have given "equal time" to defense contentions. However, the authorities cited in our main brief (pp. 58-63) hold that particularly in a close case the Court is obligated to instruct the jury in a manner that presents a fair and impartial picture of the evidence. Where the trial Judge, even unwittingly and simply by emphasis, presents a distorted picture of the record, a new trial is required.

At bar, Mamone's principal defense was the absence of evidence of his involvement in any narcotics transaction and the fact that the Beach Rose Social Club was a social and gambling facility attended by neighborhood people and that to the extent narcotics transactions were arranged there, they were done surreptitiously to prevent card players from becoming aware thereof. Because Mamone was denied adequate pre-trial disclosure his defense was limited to negative evidence adduced upon cross-examination. It is respectfully submitted that the Court's failure to even mention such evidence of Mamone's non-involvement created an imbalanced picture of the evidence against Mamone. Since this distorted view of the evidence was the last impression carried by the jury into its deliberations after Mr. Curran's inflammatory and inaccurate summation concerning Mamone, prejudice inevitably resulted and a new trial is required.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed against defendant Mamone. In the alternative, the judgment of conviction should be reversed and a new trial ordered. Failing such relief, Mamone's conviction and sentence* under 21 U.S.C. 174 should be vacated and the matter remitted to the District Court for sentence pursuant to 21 U.S.C. 841, et seq..

October 16, 1974.

Respectfully submitted,

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*The government does not dispute that Mamone was improperly sentenced under the old law.